

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NIKI FRENCHKO,) Case No. 4:23-cv-781
)
Plaintiff,)
)
vs.) Cleveland, Ohio
) Tuesday, April 18, 2023
PAUL MONROE, et al.,)
)
Defendants.)

TRANSCRIPT OF MOTION HEARING PROCEEDINGS

BEFORE THE HONORABLE J. PHILIP CALABRESE

UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography; transcript produced with computer-aided transcription.

1 APPEARANCES:

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3 For Plaintiff Niki Frenchko:

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TUESDAY, APRIL 18, 2023

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(Proceedings commenced at 2:16 p.m.)

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THE COURT: Good afternoon.

6 This is Case Number 4:23-cv-781, Niki Frenchko versus
7 Paul Monroe and others.

8 Counsel, will you please state your appearances for
9 the record.

10 MR. MILLER-NOVAK: Matt Miller-Novak on behalf
11 of Commissioner Niki Frenchko.

12 THE COURT: All right. Thank you. Thank you
13 for being here on short notice.

14 This is a lawsuit that was filed yesterday along with
15 a motion for temporary restraining order. Temporary
16 restraining order proceedings of course may proceed ex
17 parte.

18 I'll note for the record that no counsel for any
19 defendant is present.

20 I'll also note for the record that yesterday, counsel
21 for the plaintiff, you in fact filed a notice detailing the
22 efforts at service notifying defense counsel and defendants
23 of the proceedings today.

24 Mr. Miller-Novak, would you please just briefly state
25 for the record the additional efforts since the filing of

1 that notice that you've made to advise the defendants and
2 their counsel of the proceedings today.

3 MR. MILLER-NOVAK: Yes, Your Honor.

4 Actually, after I filed that notice with the Court
5 through the e-file system, I did call and leave phone
6 messages with both. I believe it was -- Prosecutor Danso is
7 the head prosecutor. I did get a bounceback on the e-mail
8 that he was out of office, and it gave the name of a Jason
9 Toth, who's an assistant prosecutor. So I also called and
10 left a message with him yesterday afternoon. And I talked
11 to Brodi Conover, who is their counsel on another case, and
12 we had tried again today before the hearing began, Your
13 Honor.

14 THE COURT: All right. Based on all those
15 efforts, the Court finds that the defendants and their
16 counsel through the office of the county prosecutor, who's
17 charged by law of representing them, had actual notice of
18 the proceedings today.

19 As I indicated, this is a motion for temporary
20 restraining order, which I have reviewed.

21 Mr. Miller-Novak, did you wish to speak to the motion?
22 You can remain seated and just speak directly into the
23 microphone, if you would, for the benefit of our court
24 reporter.

25 MR. MILLER-NOVAK: I appreciate it, Your

1 Honor.

2 Honestly, Your Honor, I think it's somewhat of an easy
3 order to grant in the sense that what I'm asking you to do
4 is things that are her statutory right as well as their
5 duties under law.

6 So I've asked for -- you know, I haven't wanted to put
7 you in a place that we have to make big sweeping decisions
8 early, I've asked for two things that I think are very
9 narrow and very important in this case moving forward, so I
10 want to break them into two parts and just kind of make them
11 digestible here. So it's really more about the information
12 and protecting information during the proceeding of this
13 case.

14 So after Ms. Frenchko was arrested in the summer of
15 2022, at least one of the commissioners after -- well, let
16 me step back for a second. Her criminal defense attorney
17 had done the normal kind of requests for discovery and asked
18 for communications between the commissioners as well as the
19 deputies.

20 It was actually a guest prosecutor at that time had
21 suggested that those records were beyond the public's
22 control because they were on personal devices. I provided
23 you plenty of law that shows that that is not true. It is
24 practically black-letter law for those of us that practice
25 open-records cases, that just because you send

1 communications in your public duties on a private cell phone
2 in the state of Ohio, doesn't mean that they're not public
3 records.

4 THE COURT: Well, those are two different
5 things you just said. You recited the black-letter law,
6 which I think is accurate, but whether they're within the
7 control of the public body is a different question.

8 So I guess one of the questions I have is whether
9 you've served subpoenas to Verizon or T-Mobile or anyone
10 like that.

11 MR. MILLER-NOVAK: We have not yet, Your
12 Honor, because under Ohio, you really shouldn't need to.
13 All you have to do is an Ohio public records request. And,
14 again, it doesn't matter if it's personal e-mail accounts,
15 personal cell phones. If the records are connected to your
16 duties as a public official in the state of Ohio, they are
17 public records, and they should be maintained as such.

18 The Supreme Court I believe has ruled on that. There
19 are plenty of cases, Your Honor, where the Supreme Court has
20 compelled governments to produce private text messages and
21 e-mails from any public body, whether commissioners or city
22 council members or anything that is defined as a public body
23 or a public official in the state of Ohio.

24 And I think that's kind of a main issue here is
25 that --

1 THE COURT: Have you made those public records
2 requests?

3 MR. MILLER-NOVAK: I have prior to this case.
4 And those records were requested in conjunction with the
5 criminal proceedings against Commissioner Frenchko and they
6 were never produced, and approximately about seven weeks --
7 six to seven weeks before we filed suit, I have also
8 requested records -- I've issued record requests that would
9 have encompassed those, and it's been crickets on their end
10 in terms of providing those.

11 But what I can note to Your Honor is that Commissioner
12 Mauro Cantalamessa has on two separate occasions stated that
13 his phone has a preset and has admitted to deleting
14 essentially text messages on his phone every 30 days.

15 THE COURT: So I guess, that being the case, I
16 don't understand why if you're getting stonewalled by the
17 defendants.

18 MR. MILLER-NOVAK: Mm-hmm.

19 THE COURT: On the public records requests, I
20 assume you have not sought a writ from the Court of Appeals
21 or the Supreme Court?

22 MR. MILLER-NOVAK: Well, I have not.

23 THE COURT: So I don't understand not having
24 taken steps to compel the city to honor the law, which, as I
25 understand it, they'd be required to do. You haven't served

1 subpoenas on the providers.

2 MR. MILLER-NOVAK: Well, I haven't served
3 subpoenas on the providers because I haven't had an active
4 case number in order to do that.

5 THE COURT: Well, under Ohio law you don't
6 need one.

7 MR. MILLER-NOVAK: Oh. Well, in going towards
8 the writ -- so here's an issue with that. Initially they
9 were requested pursuant to just criminal discovery under
10 that law. In terms of our --

11 THE COURT: Are they really criminal
12 discovery, though? I mean, criminal discovery is much
13 narrower and different than -- open file in Ohio is
14 different than federal obviously, but it's not civil
15 discovery either.

16 MR. MILLER-NOVAK: Well, there's actually some
17 case law that suggests that criminal discovery can be more
18 broad actually than Open Records Act because certain things
19 that might fall under an exemption to Open Records Act could
20 be discoverable in a criminal case. And same thing with a
21 civil case, Your Honor. You could ask for things that fall
22 under an exemption. Like trade secrets, for instance. If a
23 government has a trade secret of a company in an economic
24 development case and you request those records, it falls
25 under an exemption. That wouldn't mean that it's not

1 discoverable in a civil case. So there are circumstances
2 where civil discovery is more broad than Ohio Open Records
3 Act and then vice versa.

4 But regarding this case, Your Honor, I think the
5 concern -- and when you look at the Open Records Act,
6 there's two portions to it. There's one, "I want the
7 records, give them to me." And there's also another part of
8 the Open Records Act that gives a taxpayer standing or a
9 requester standing to actually enjoin the government from
10 destroying records. And I think that's more what's at case
11 here because we have one of these commissioners who's openly
12 admitted that his cell phone has destroyed certain
13 communications that would fall under public records, and he
14 has --

15 THE COURT: Given that admission, I don't know
16 why you haven't pursued those remedies through the state
17 courts, which my experience says that they do actively
18 enforce those remedies.

19 MR. MILLER-NOVAK: They do, but the reason
20 we've decided to do that here, because, number one, I
21 believe that it falls under this court's ancillary
22 jurisdiction. And the records that we are seeking directly
23 relate to the substantive case that falls under the Fourth
24 and First Amendment.

25 And the other issue is too, Your Honor, if you look at

1 standing for a writ for the open records case, it's very --
2 like it could be anybody, and it's any person. If you look
3 at standing for getting an injunction for destruction of
4 records, you have to have a personal stake and a personal
5 harm. That's required under the law. And because this case
6 Commissioner Frenchko requested records that related to
7 communications surrounding her arrest during her own
8 meeting, that we think that it's so related and intertwined
9 with this that it probably would not have been the
10 responsible course to have two separate actions, we think we
11 would have probably run into a lot of briefing and
12 objections from the defendant.

13 If you want me to continue.

14 THE COURT: Yes, please.

15 MR. MILLER-NOVAK: Okay.

16 So that is largely why we're here today. We're just
17 trying to preserve evidence, Your Honor, and preserve public
18 records. If this gentleman has a preset on his phone -- and
19 I will add that he also publicly admitted again many months
20 later that his phone is now still deleting text messages and
21 is, quote/unquote, on a preset. I obviously have owned many
22 cell phones in the last 20-some years, as many of us have,
23 and I'm not aware of any phone model that has a preset where
24 it automatically deletes text messages.

25 THE COURT: Mine does.

1 MR. MILLER-NOVAK: Does it?

2 Well, we'll take him at his word, and maybe it does,
3 but --

4 THE COURT: But, see, that goes back to my
5 subpoena question because just because the phone is set that
6 way, doesn't mean that the provider doesn't have the
7 records.

8 MR. MILLER-NOVAK: I don't think it will, Your
9 Honor. And the reason I don't think it will is because I'm
10 pretty sure cell phone records don't necessarily preserve
11 the messages themselves. What they preserve is the
12 communication. So to show a number -- texting a number, it
13 won't necessarily have the messages contained within that.
14 I do not believe that a --

15 THE COURT: I suspect we're going to find out
16 in the course of this litigation.

17 MR. MILLER-NOVAK: We most certainly are going
18 to subpoena things and find out, but what we're really
19 asking this court is since we know that there is a pattern
20 of at least one of these defendants openly admitting that he
21 has not changed the preset on his phone, because we all know
22 you can do that, and you can also take screenshots of your
23 public records, you can do that. So he admits that he knows
24 that his phone is destroying public records and he allows it
25 to continue.

1 So what we're just asking for is that this court
2 orders that it -- any evidence relating to this case is
3 preserved, number 1. Number 2, that any public records
4 contained on his or anybody else's phone or e-mail accounts
5 are also maintained and not destroyed during the pendency of
6 this case.

7 The other issue that we've come here today for is that
8 it's the open meetings law that essentially I cited at least
9 two cases that people have a right to record public meetings
10 in the state of Ohio of a public body. And essentially
11 Commissioner Frenchko, because the county itself does not
12 videotape its meetings, it's just part of her thing, she
13 likes to live-stream the meetings so the public can see
14 every word that's spoken, everything that happens in her
15 mission of transparency. In addition to that, as we've kind
16 of told the story, she does obviously not have a very good
17 relationship with the county sheriff's department and she's
18 had problems with them in the past, so she feels that she
19 needs to do it to protect herself.

20 Recently, in March of 2023, Sheriff Monroe attended a
21 commissioners meeting. Now I think we all should understand
22 that this is a commissioners meeting, and technically any
23 other agent of the county is technically a visitor at a
24 commissioners meeting. The public body is the
25 commissioners. Mr. Monroe attended the meeting, and while

1 she was live-streaming it, she turned the camera to record
2 his comments during the meeting. He very aggressively said,
3 "I do not consent to this." He immediately approached her,
4 took the camera from her stand that was attached to her hand
5 and slammed it down on the table.

6 We've obviously made allegations in our complaint that
7 that is a violation of the Fourth Amendment and an unlawful
8 seizure of property as well as trespass to her property and
9 battery. But in the meantime, I think what's really
10 important here is that she has a right in the state of Ohio,
11 and I would argue probably a First Amendment right as well,
12 to record a public meeting.

13 I don't think I cited it, but there was a recent
14 Southern District case called -- I think it was *Hicks versus*
15 *Crowley*, where the Southern District of Ohio did talk to
16 some length about the right to information in public
17 meetings under the First Amendment here.

18 So all we're asking is that her right to record
19 meetings, which is guaranteed under the state of Ohio and I
20 would argue the First and Fourteenth Amendments is no longer
21 interfered with during the pendency of this meeting because
22 certain statements might be made in these meetings that are
23 actually supportive of her claims.

24 THE COURT: Well, let me ask a couple other
25 questions that go beyond the specific motion that brings at

1 least you here today.

2 First, I know the lawsuit was just filed yesterday, so
3 we're at the earliest of early days in the case, but what
4 efforts at service have been made of the summons and the
5 complaint?

6 MR. MILLER-NOVAK: Well, I always start, Your
7 Honor, with sending waivers of service to see if those are
8 done, and these were -- I had my paralegal e-mail me the --
9 I was out of town, so I forwarded those to the head
10 prosecutor of the county.

11 Now, you know -- and just as matter of course that it
12 tends to represent counties in these cases, and I'm sure --
13 I don't know, you know, some of these individuals might get
14 their own counsel and things like that. I don't know how
15 that will shake out, Your Honor. But for at least now, I've
16 sent a copy of the complaint as well as this motion to the
17 head prosecutor as well as the assistant prosecutor.

18 And then I'm aware of an attorney in Cincinnati named
19 Brodi Conover with Bricker & Eckler, who represents the
20 county in another case, and I called and talked to him. And
21 I also sent him a copy of the pleadings I think.

22 THE COURT: The reason I ask about that -- and
23 I'll just be upfront about this -- and I'll expect you to
24 file waivers if they come back promptly. If not, my very
25 strong preference would be that you effect personal service

1 so as to minimize the time for responses because the minute
2 that defendants are represented, I expect them to appear in
3 person in this court through counsel, even before their
4 answer date. I have never had defendants not respond to a
5 TRO motion before. I understand that they're not served,
6 that they have no obligation to be here, but I do expect
7 them to fully participate in these proceedings. And there's
8 some things that I have prepared to ask them about today and
9 I need to have that conversation with them. You can advise
10 them of that, you can give them the transcript, but we will
11 be back here as soon as they have actual receipt of the
12 summons and complaint and process.

13 Next, let me ask you, what efforts to resolve this
14 dispute between Commissioner Frenchko and the defendants
15 have been made before filing suit?

16 MR. MILLER-NOVAK: I will say right now that
17 the relationship between these parties is kind of the
18 Hatfields and McCoys right now, Your Honor. I don't know
19 that -- I don't know how welcoming ears will be, but, you
20 know, it's not as if it wasn't publicly known that her
21 criminal defense attorney, who is now my co-counsel, David
22 Betras, had expressed his feelings about the matter and his
23 intent to file suit and -- I mean, they've kind of doubled
24 down, in our opinion, when they came to another meeting and
25 seized her phone. That isn't exactly a correction of course

of conduct for us. It's actually showing a pattern of
interfering with her civil rights.

3 So at this point in time we felt it was necessary to
4 file this action. At this point -- and, you know, I'm never
5 going to turn down an opportunity to talk, but it hasn't
6 presented itself yet, Your Honor. And given their
7 statements in the media, I don't know it will anytime soon,
8 to be honest.

9 | (Pause in proceedings.)

10 MR. MILLER-NOVAK: And if Your Honor wishes,
11 not to keep talking during awkward silence, but if --

12 THE COURT: I was just making some notes. My
13 apologies.

14 MR. MILLER-NOVAK: No, that's okay.

15 But if Your Honor wishes, I mean, we don't mind, we
16 can pursue personal service, if you'd prefer that.

23 MR. MILLER-NOVAK: Okay. You think giving it
24 about a week would be your preference?

THE COURT: I'll defer to your judgment on

1 that.

2 MR. MILLER-NOVAK: Okay.

3 THE COURT: You've worked with some of these
4 counsel and parties before, so you'll have a good sense of
5 that.

6 MR. MILLER-NOVAK: Okay. Thank you.

7 (Pause in proceedings.)

8 THE COURT: All right. So turning to the
9 motion for temporary restraining order, I'm prepared to rule
10 on that based on your argument and review of the papers.

11 Temporary restraining order constitutes an
12 extraordinary and emergency measure. In analyzing whether
13 to grant a temporary restraining order, a court analyzes
14 whether specific facts in an affidavit or a verified
15 complaint clearly show that immediate and irreparable
16 injury, loss, or damage will result to the movant. That's
17 the standard under Rule 65(b)(1)(A).

18 Temporary restraining order intends to prevent
19 immediate and irreparable harm to the complaining party
20 during the period necessary to conduct a hearing on a
21 preliminary injunction. Its purpose is to preserve these
22 things -- state of things until the rights of the parties
23 can be fairly and fully investigated.

24 To determine whether to grant a temporary restraining
25 order, a court considers the following factors:

1 1, whether the movant has shown a strong or
2 substantial likelihood of success on the merits;

3 2, the movant will suffer irreparable harm without the
4 relief requested;

5 3, granting the relief requested will cause
6 substantial harm to others;

7 And 4, the public interest will be served by granting
8 the relief requested.

9 Although no single factor is determinative, a finding
10 that there is simply no likelihood of success on the merits
11 is usually fatal.

12 In this case, as Mr. Miller-Novak has indicated, the
13 likelihood of success on the merits lies with the plaintiffs
14 on the particular bases on which the temporary restraining
15 order is sought, so that particular aspect of Sixth Circuit
16 law does not come into play. By which, I mean the Sixth
17 Circuit says that "a finding that there's no likelihood of
18 success on the merits is usually fatal," so that's not what
19 comes into play here.

20 In this case, in my view, the analysis turns on
21 irreparable harm, the second of the factors.

22 Under the law of this circuit, where money damages do
23 not fully compensate for an injury, a plaintiff's harm is
24 irreparable. Money damages do not fully compensate an
25 injury where the nature of the loss makes it difficult to

1 calculate or determine damages.

2 In my view, that is not the case here. With respect
3 to both aspects of relief sought, the law does regularly
4 contemplate reducing the loss of records or the failure to
5 record public meetings to civil damages that are
6 recoverable, so I don't think it's a case that's ripe at the
7 moment for a temporary restraining order. That's certainly
8 the case in the public meetings context with respect to the
9 second matter Mr. Miller-Novak raised.

10 With respect to destruction of records, Ohio law
11 specifically provides a cause of action for spoliation of
12 evidence. So under that cause of action, any destruction of
13 records would be subject to civil remedy under that
14 provision. In addition, I note that at the very latest,
15 yesterday, and very likely considerably earlier, each of the
16 defendants was under a duty imposed by law to preserve
17 evidence. And if they have failed to discharge that duty,
18 federal law and the civil rules provide remedies for that
19 and sanctions under Rule 37 and otherwise. So those are the
20 appropriate remedies, in my view, based on the relief
21 sought.

22 I don't think it's appropriate at this juncture to
23 issue an order specifically requiring the defendants to
24 preserve those records. Again, I think the duty at this
25 state of affairs suffices. I believe the defendants are on

1 notice of that and their obligations. And, again, if they
2 have failed to take steps to preserve those documents that
3 might be at issue and responsive and discoverable, then the
4 law imposes consequences for that.

5 Unfortunately I've had -- in several other cases -- to
6 deal with that, so if we have to go down that path, we'll go
7 down that path.

8 One additional factor I note that comes into play with
9 respect to granting the temporary restraining order motion
10 or actually denying it on this record is that, as
11 Mr. Miller-Novak indicated, the specific dispute dates to
12 July of 2022, so I don't think this is a situation where
13 there's a threat of imminent harm.

14 I know you see that differently, but I don't think the
15 threat is any different today than it was, say, a week ago
16 or the like. And, again, I think that the defendants have a
17 duty and obligation at this point that will suffice to
18 remedy the issues complained of in the motion.

19 I will ask, Mr. Miller-Novak, that you promptly serve
20 subpoenas on each of the cell phone providers. I'll make a
21 note of that under Rule 45. The owners of the cell phones
22 are entitled to notice before you serve that, so I'll direct
23 you to serve those subpoenas next week. But I'll include
24 notice in the minutes and order coming out of today that
25 I've directed you to serve those subpoenas so that they're

1 on notice under Rule 45 that if they intend to object, their
2 time is running.

3 MR. MILLER-NOVAK: Your Honor, I can't. I
4 don't know who their cell phone providers are at this time.

5 THE COURT: I'll add that to the agenda in
6 that case for our first meeting. I'll ask them to identify
7 on the record who it is and direct you to serve promptly at
8 that point.

9 MR. MILLER-NOVAK: Okay.

10 Your Honor?

11 THE COURT: Yes.

12 MR. MILLER-NOVAK: Since it sounds like you're
13 going to deny my TRO, should I --

14 THE COURT: I will, yes.

15 Let me make clear one thing for the record for you and
16 for the record. Again, I don't think that that relates in
17 any way to the likelihood of success on the merits, either
18 with respect to the two issues you've identified or any
19 other claim here, so I would not want you or any defendant
20 to read the record that way.

21 I'm sorry. I cut you off.

22 MR. MILLER-NOVAK: No. That's fine. It's
23 your courtroom, you're allowed to do that.

24 So -- but regarding the preliminary injunction, Your
25 Honor, I may withdraw it because I think this makes sense to

1 do so. And maybe what I would ask for instead, if you would
2 be so kind, is to open up -- and I think you kind of have --
3 and maybe to open up some expedited discovery because, you
4 know, that might be really important to preserve records and
5 to seek that information if they happen to file a 12(b) (6).
6 What I would hate to see is for us to be in briefing on
7 initial motions to dismiss on immunity and other issues and
8 not get to pursue those records in the meantime.

9 THE COURT: Well, that's one reason why I
10 wanted to get everybody in here in person and on the record
11 at the first moment where the defendants have actually been
12 served. We'll discuss all of those issues and talk about
13 discovery and motions and any number of other things on my
14 agenda including sending those subpoenas.

15 MR. MILLER-NOVAK: That would be great. Thank
16 you.

17 THE COURT: Any other items from your
18 perspective?

19 MR. MILLER-NOVAK: I don't believe so, Your
20 Honor. None that I think we should be talking about until
21 they're all here I guess.

22 THE COURT: All right. I will put out an
23 order. It's very likely just going to say for the reasons
24 stated on the record, the Court denies the motion for
25 temporary restraining order and directs you to do the other

1 things we've talked about today.

If there's nothing further, we'll stand adjourned for now but reconvene as soon as we have defendants who are ready, willing, and able to appear.

5 Thank you.

6 (Proceedings concluded at 2:46 p.m.)

C E R T I F I C A T E

11 I certify that the foregoing is a correct transcript
12 of the record of proceedings in the above-entitled matter
13 prepared from my stenotype notes.

14 /s/ Gregory S. Mizanin October 3, 2023
15 GREGORY S. MIZANIN, BDR, CRR DATE

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